No. 92-1574

In the Supreme Court of the United States

OCTOBER TERM, 1992

BUDDY CRAMER, PETITIONER

v.

FEDERICO PEÑA, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the "Love Field Amendment," which restricts interstate air service to and from Love Field in Dallas, Texas, violates petitioner's constitutional rights to interstate travel and free speech or the Port Preference Clause.

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OPINIONS BELOW

The court of appeals' per curiam affirmance of the district court's judgment (Pet. App. 1a) is reported at 983 F.2d 232 (Table). A prior opinion of the court of appeals addressing the merits of petitioner's claims (Pet. App. 4a-33a) is reported at 931 F.2d 1020. The opinions of the district court (Pet. App. 2a-3a, 34a-39a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1993. The petition for a writ of certiorari was filed on March 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 48, popularly known as the "Love Field Amendment," restricts interstate air travel involving Love Field, which is located near Dallas, Texas. The Love Field Amendment was intended to provide "a fair and equitable settlement for a dispute that ha[d] raged in the Dallas/Fort Worth area for many years." H.R. Conf. Rep. No. 716, 96th Cong., 1st Sess. 24 (1979). As the court of appeals explained, the two cities "fought long and bitterly over which city should have the principal airport for the two-city metropolitan area," and they "settled their dispute by building Dallas-Fort Worth International Airport (DFW)." Pet. App. 6a. "The Love Field amendment carries out the agreement between Dallas and Fort Worth that ended the competition between those cities for the area's principal airport." *Id.* at 24a.

The Love Field Amendment prohibits airlines from offering single ticket interstate service to or from Love Field and any State other than the four States that border Texas—Louisiana, Arkansas, Oklahoma, and New Mexico (the "Love Field service area"). Pub. L. No. 96-192, § 29, 94 Stat. 48. Passengers may travel between Love Field and points outside the Love Field service area by taking a second flight. Such travelers must buy a separate ticket for each leg of their journey, however, and cannot check their baggage through for the entire trip. *Love Field Amendment Proceeding*, DOT Order 85-12-81 (Dec. 31, 1985), petition for review denied, *Continental Air Lines, Inc.* v. *Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988). Passengers may also obtain unrestricted interstate airline services at the Dallas-Fort Worth International Airport, located

18 miles from the center of Dallas and only 12 miles from Love Field. Pet. App. 7a. The Love Field Amendment does not restrict a limited number of charter air flights to or from Love Field, flights provided by commuter airlines operating aircraft with a passenger capacity of fewer than 57 passengers, or the interstate service provided from Love Field on November 1, 1979. Pub. L. No. 96-192, § 29 (a) and (b), 94 Stat. 48.

The Love Field Amendment, as construed by the Department of Transportation, also prohibits airlines and their agents from advertising or volunteering information on scheduled interstate services offered with large aircraft between Love Field and points outside the service area. Pub. L. No. 96-192, § 29(b), 94 Stat. 48; *Love Field Amendment Proceeding*, DOT Order 85-12-81 (Dec. 31, 1985). Airlines and their agents may, however, provide such information in response to a passenger's request.

2. Petitioner Buddy Cramer is an occasional airline passenger residing in Texas. On April 21, 1989, he filed a complaint in the United States District Court for the Northern District of Texas, seeking declaratory and equitable relief against those responsible for enforcing the Love Field Amendment. Pet. App. 8a.* As amended, petitioner's complaint asserted that the Love Field Amendment unconstitutionally burdens his right to travel interstate and also violates the Port Preference Clause, Art. I, § 9, Cl. 6, and the First Amendment. Pet. App. 35a-36a. The government moved to dismiss the complaint for lack of standing or, in the alternative, for

* The complaint named as defendants the United States, the Department of Transportation, the Secretary of Transportation, the Department's Office of Aviation Analysis, and the Director of that Office.

summary judgment. Petitioner filed a cross-motion for summary judgment. The district court granted the motion to dismiss for lack of standing. *Id.* at 39a.

3. On petitioner's appeal, the court of appeals vacated the district court's judgment and remanded the case to the district court. The court of appeals "conclude[d] that the district court erred by dismissing [petitioner's] suit for lack of standing, but properly denied [petitioner's] cross-motion for summary judgment." Pet. App. 33a. In reaching the latter conclusion, the court rejected each of petitioner's constitutional objections on the merits. Pet. App. 21a-33a. Because the defendants had not cross-appealed from the district court's jurisdictional dismissal, the court vacated the district court's judgment and remanded the case with instructions to reconsider the government's motion for summary judgment. *Id.* at 33a. This Court denied a petition for a writ of certiorari. *Cramer* v. *Skinner*, 112 S. Ct. 298 (1991).

4. On remand, the district court granted the government's motion for summary judgment, relying on the court of appeals' decision rejecting each of petitioner's constitutional claims. Pet. App. 2a-3a. Petitioner appealed again, and the court of appeals affirmed without opinion. Pet. App. 1a.

ARGUMENT

Petitioner's three constitutional objections to the Love Field Amendment lack merit, and the court of appeals' decision to that effect does not conflict with any decision of this Court or any court of appeals. Further review is not warranted.

1. Petitioner first contends that the Love Field Amendment unconstitutionally infringes his right to interstate travel. Pet. 9-12. More specifically, relying on *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), and *Attorney General* v. *Soto-Lopez*, 476 U.S. 898 (1986),

petitioner argues that the Love Field Amendment "classifies" persons as Love Field passengers or non-Love Field passengers and impermissibly prohibits the former class from boarding certain interstate flights. Pet. App. 11a.

The cases on which petitioner relies have little in common with this case. The dispute in *Shapiro* involved a one-year waiting period for new state residents seeking welfare assistance and the dispute in *Soto-Lopez* involved the permanent deprivation of an employment preference. In contrast, the Love Field Amendment restricts interstate travel at one Texas airport but allows unrestricted travel to and from an airport 12 miles away. Pet. App. 7a. Petitioner's argument "reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel." *City of Houston* v. *Federal Aviation Administration*, 679 F.2d 1184, 1198 (5th Cir. 1982).

2. Petitioner next raises a facial challenge to the Love Field Amendment based on the First Amendment. Pet. 13-19. Petitioner argues that the Love Field Amendment violates the Free Speech Clause by prohibiting airlines and travel agents from advertising the limited scheduled interstate travel that is allowed between Love Field and points outside its service area. The court of appeals correctly concluded that there is no merit to petitioner's claim.

As an initial matter, the court of appeals correctly concluded (Pet. App. 29a) that the speech at issue is "commercial speech" because the restriction at issue bars speech that would "propose a commercial transaction." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Petitioner responds (Pet. 13-14) that the Love Field Amendment must survive heightened scrutiny because it restricts speech concerning interstate travel,

a constitutionally protected right. But this Court's previous decisions have accorded such scrutiny only where the underlying conduct "could not have been prohibited by the State." *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 345 (1986). Petitioner concedes that Congress could have "limit[ed] the number of operations (*i.e.*, takeoffs and landings) at Love Field." Pet. 19. Indeed, Congress could have closed Love Field altogether. Moreover, petitioner's theory would extend heightened scrutiny to speech that is only tangentially related to a claimed constitutional right. It therefore would erase the distinction between commercial and fully protected speech and ignore this Court's insistence on maintaining the distinct treatment accorded the two. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 562-563 n.5 (1980); see also *Board of Trustees* v. *Fox*, 492 U.S. 469, 474-475 (1989).

The court of appeals also correctly rejected petitioner's claim that the Love Field Amendment does not survive review under the three-part test applicable to commercial speech. Commercial speech may be restricted "if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest." *Posadas*, 478 U.S. at 340. The Love Field Amendment satisfies each part of that test.

First, Congress had a substantial interest in resolving the regional dispute that led to the enactment of the Love Field Amendment, since it thereby improved airline service for the Dallas-Fort Worth area. Moreover, the government's interest is directly relevant to the commercial nature of the restricted speech, since the government legitimately seeks to discourage the commercial transactions that petitioner would encourage.

Thus, the case differs from *City of Cincinnati* v. *Discovery Network*, 113 S. Ct. 1505 (1993), in which the Court struck down an ordinance that prohibited the use of newsracks to distribute publications consisting entirely of advertising, but not other publications such as newspapers. The Court emphasized in that case that "the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted," *id.* at 1514, which focused on the visual blight caused by newsracks. Here, Congress restricted commercial speech because it had a substantial interest in restricting certain commercial transactions.

Second, the restrictions at issue here directly advance the government's interest: the prohibition on advertising service between Love Field and points beyond its service area may reasonably be expected to reduce the use of Love Field for such flights. That reduction, in turn, may reasonably be expected to increase the use of the Dallas-Fort Worth International Airport. See *Posadas*, 478 U.S. at 341-342; *Central Hudson*, 447 U.S. at 569. Because the restriction on advertising service beyond the Love Field service area directly advances the government's interest, this case is similar to *Central Hudson*, 447 U.S. at 568, where the Court held that the government had a legitimate interest in reducing demand for electricity, and *Posadas*, 478 U.S. at 341, where the Court held that the government had a legitimate interest in reducing demand for casino gambling by local residents.

Third, a reasonable fit exists between the government's interest and the challenged restrictions. See *Board of Trustees* v. *Fox*, 492 U.S. at 480. As the court of appeals observed (Pet. App. 32a-33a), "[w]ithout the ban on advertising, more intrusive restrictions might be necessary to carry out Congress' decision to keep service at Love Field from undermining the

agreement between Dallas and Fort Worth." Interested travelers may still ask any airline or travel agent for information regarding the scheduled interstate service provided with large aircraft between Love Field and points outside its service area. The fact that Congress might have barred such operations at Love Field altogether does not undermine its reasonable judgment to allow limited exceptions, but to prohibit advertising relating to those exceptions. See *Board of Trustees*, 492 U.S. at 479; *Posadas*, 478 U.S. at 344.

3. Finally, petitioner asserts that the Love Field Amendment violates the Port Preference Clause. Pet. 19-25. That Clause provides that "[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." Art. I, § 9, Cl. 6.

Petitioner argues that the Love Field Amendment discriminates against ports in those States not within the Love Field service area. Pet. 19-24. But the Port Preference Clause prevents preferences *between States*, and "does not forbid such discrimination as between ports." *Alabama G. S. R.R.* v. *United States*, 340 U.S. 216, 229 (1951) (quoting *Louisiana Public Service Comm'n* v. *Texas & N.O. R.R.*, 284 U.S. 125, 131 (1931)). Congress may constitutionally act to benefit particular ports even if ports in the same or neighboring States are incidentally disadvantaged. *Ibid.* Congress has in this case acted to benefit the Dallas-Fort Worth International Airport, not to discriminate against States lying outside the Love Field service area. To the extent that the States abutting Texas are incidentally benefited by the Love Field Amendment, it is merely the "result of geography," *ibid.*, not the result of an unconstitutional congressional preference for the ports of those States in the Love Field service area. Thus, as the court of

appeals noted (Pet. App. 27a-28a n.14), petitioner has not demonstrated that Congress deliberately discriminated against the other 45 States by requiring that single ticket travelers to or from them employ the Dallas-Fort Worth International Airport instead of Love Field.

Petitioner also suggests that the Love Field Amendment violates the Port Preference Clause because passengers leaving Love Field generally must land in one of the States in Love Field's service area. Pet. 24-25. But passengers leaving from the Dallas-Fort Worth Airport, only 12 miles from Love Field, are subject to no such restrictions, so the Love Field Amendment does not require "Vessels bound to, or from, one State * * * to enter, clear, or pay Duties in another." In any event, petitioner acknowledges that this issue presents a "question of first impression." Pet. 25. Review by this Court is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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